IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JESS WILLIAM ANAYA,
Appellant.

No. 2 CA-CR 2018-0280
Filed April 8, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Gila County
No. S0400CR201700388
The Honorable Timothy M. Wright, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Jess Anaya was convicted of first-degree murder and child abuse. The trial court sentenced him to concurrent prison terms, the longest of which is natural life in prison. On appeal, Anaya argues the court erred by admitting "irrelevant and prejudicial" evidence and hearsay testimony, giving a flight instruction, and denying his request for a *Willits*[1] instruction. Anaya also argues that he was denied a fair trial because of "multiple instances of prosecutorial misconduct," and he maintains the court erred in denying his motion made pursuant to Rule 20, Ariz. R. Crim. P. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to affirming Anaya's convictions. *See State v. Molina*, 211 Ariz. 130, ¶ 2 (App. 2005). Early one morning in August 2017, Anaya, his girlfriend K.C., and K.C.'s twenty-two-month-old son R.C. left their house to drive K.C. to work. Afterward, Anaya drove R.C. to his mother L.S.'s house to play with his three children. Anaya and R.C. remained at L.S.'s house until around noon when they left to pick up K.C. for lunch. During the lunch hour, Anaya, K.C., and R.C. returned to their house, where K.C. and R.C. watched a movie. R.C. was "happy" and did not have any "marks" or "bruising" on his body. Shortly before 1:00 p.m., Anaya, with R.C.—who was noticeably "tired" and "cranky"—drove K.C. back to work. At that time, Anaya also sent a text message to L.S. stating, "I'll be over a little later. I'm going to give [R.C.] his nap first."

¶3 After returning home with R.C., Anaya and his cousin made plans to go to a marijuana dispensary, but Anaya informed his cousin they would have to wait for R.C., who was "cranky," to nap. About an hour and a half later, while L.S. and her granddaughter were alone at L.S.'s house sleeping, Anaya came "running in" with R.C. in his arms saying, "[R.C.]

[1]*State v. Willits*, 96 Ariz. 184 (1964).

had fallen off the wall [in L.S.'s yard] and he did[not] know what to do." Anaya asked L.S. to "check [R.C.]," and L.S. saw that R.C. was "lifeless" and "limp" with "his eyes . . . rolling up into the back of his head." L.S. called 9-1-1 and told the dispatcher R.C. "fell off a wall." L.S. then called K.C. and told her "[R.C.] had gotten hurt."

¶4 When the paramedics arrived, Anaya was holding R.C. in one arm; R.C. was "limp" and appeared to be "unconscious or . . . dead." Anaya and L.S. told the paramedics that R.C. had "f[allen] from the wall and hit his head" in L.S.'s front yard. But there was no "dirt" or "debris" on R.C. nor were there "footprints" or "any sign of disturbance in the gravel or dirt" where R.C. purportedly had fallen. After assessing R.C.'s injuries, the paramedics determined his "respiratory rate was very, very low," started "ventilations with a bag valve mask device," and proceeded to transport R.C. to the Cobre Valley Regional Medical Center's helipad to transport him to Phoenix Children's Hospital. At the helipad, the air paramedics immediately observed R.C. was unable "to continue breathing on his own" and determined he required a "rapid sequence induction" which involved placing him in a medically induced coma to secure his airway with a breathing tube. During this process, the air paramedics observed "bruising across [R.C.'s] neck."

¶5 When R.C. arrived at Phoenix Children's Hospital, his eyes were "fixed and dilated" which indicated "severe brain injury." He underwent a CT scan, which revealed R.C. had suffered a "lack of oxygen . . . for a significant amount of time," and blood on the tracheal tube indicated there was bleeding in his airway. A physical examination revealed bruising on his chest, buttocks, forehead, behind his ears, and around his neck. A pediatric neurosurgeon determined he had suffered a "non-survivable injury." The following day, a pediatric intensive care physician concluded that R.C. had suffered "brain death." His "brain had swollen and . . . had pushed itself down through the opening of the base of the skull," which "cut[] off all blood supply to the brain." The physician pronounced R.C. dead.

¶6 Anaya was indicted for one count of intentionally or knowingly committing child abuse likely to produce death or serious injury and one count of first-degree murder, and he was convicted and sentenced as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Admission of Evidence

¶7 Anaya argues the trial court erred in admitting "irrelevant and prejudicial" text messages and photographic evidence at trial. "We review a trial court's ruling on the admissibility of evidence for an abuse of discretion." *See State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 7 (App. 2013); *see also State v. Rushing*, 243 Ariz. 212, ¶ 24 (2017) (reviewing admission of photographic evidence for abuse of discretion).

¶8 Generally, to be admissible, evidence must be relevant. Ariz. R. Evid. 402. Evidence is relevant if it has "any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Ariz. R. Evid. 401; *see State ex rel. Thomas v. Duncan*, 216 Ariz. 260, ¶ 13 (App. 2007); *cf. Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 496 (1987) ("[E]vidence is relevant only if it relates to a consequential fact . . . ."). However, even relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Ariz. R. Evid. 403; *see State v. Hardy*, 230 Ariz. 281, ¶ 40 (2012); *see also State v. Butler*, 230 Ariz. 465, ¶ 33 (App. 2012) ("[U]nfair prejudice 'means an undue tendency to suggest decision on an improper basis,' such as emotion, sympathy or horror." (quoting *State v. Schurz*, 176 Ariz. 46, 52 (1993))).

Text Messages

¶9 Anaya contends the trial court erred by admitting text messages about going to a marijuana dispensary that he had sent while caring for R.C. on the day of the incident. He asserts that because "there [was] no evidence to show that [he] was using marijuana or was under the influence" that day, the text messages "do not add anything to the case." We disagree.

¶10 Shortly after Anaya drove K.C. back to work after lunch, and notified L.S. that he was putting R.C. down for a nap, he sent a text message to his cousin that included a marijuana dispensary "menu" listing different types of marijuana. His cousin replied, asking if they were going to go to the dispensary "before happy hour's over" because the marijuana would be "five [dollars] off." Anaya responded, "y[e]s" then told her to "wait a little bit so [R.C.] can nap" because "he's freaking cranky."

¶11 In objecting to the admission of the text messages at trial, Anaya argued they were "not relevant," "extremely prejudicial," and had "nothing to do with the case." The state responded that the text messages

were relevant to show Anaya had been "distracted from [caring for R.C.] by his preoccupation with using marijuana" and showed he was "impatien[t] and frustrat[ed] with [R.C.], because he would[not] take his nap." The state explained that the jury would "want some possible reasons as to why" R.C. had died and that the state was "entitled to show a motive." The trial court concluded that the state could introduce the text messages and determined the fact that Anaya had "looked up a menu at a medical marijuana dispensary" was not "particularly prejudicial" because there was no "crime in that." The text messages were later admitted during trial.

¶12 The text messages were admissible for two reasons. First, the exchange between Anaya and his cousin constituted probative evidence from which the jury could reasonably infer that Anaya had been preoccupied and frustrated while watching R.C. because he would not take a nap. Ariz. R. Evid. 401, 402; *see also State v. Hunter*, 136 Ariz. 45, 50 (1983) ("[I]t is well settled that in a murder prosecution the presence or absence of motive is relevant."). Second, as the trial court correctly noted, discussing the marijuana dispensary menu to show Anaya's frustration and distraction while caring for R.C., and nothing else, was not unfairly prejudicial. *See Hardy*, 230 Ariz. 281, ¶ 40. Accordingly, we cannot say the court abused its discretion in concluding that the probative value of the text messages was not outweighed by a danger of unfair prejudice. *See State v. Rivers*, 190 Ariz. 56, 60 (App. 1997) (reviewing trial court's application of Rule 403 for abuse of discretion).

Hospital and Helicopter Photographs

¶13 Anaya also argues the trial court erred in admitting photographs of Phoenix Children's Hospital and a Native Air Helicopter. He maintains the photographs were "irrelevant" and "highly prejudicial" because neither photograph had a tendency to make a fact of consequence more or less probable.

¶14 At trial, the state argued a photograph of Phoenix Children's Hospital was relevant and admissible because it was the location of where "[R.C.] was taken," "where he died," and "where all [of] this happened." It also argued a photograph of a Native Air Helicopter was relevant and admissible to show "the unit that transported [R.C.]" to Phoenix Children's Hospital. Anaya argued neither photograph was relevant because they had "nothing to do with proving any fact in th[e] case." The trial court admitted the two photographs at trial.

¶15 Trial courts have "considerable discretion in determining relevance and admissibility of evidence." *See State v. Kiper*, 181 Ariz. 62, 65 (App. 1994). But, in this case, although the fact that R.C. had been transported to the hospital was relevant because it had some bearing on the severity of the child's injuries, how the child was transported (Native Air Helicopter), and to which hospital (Phoenix Children's Hospital) arguably were not. *See* Ariz. R. Evid. 401(b); *see also Duncan*, 216 Ariz. 260, ¶ 13; *cf. Hawkins*, 152 Ariz. at 496. But we need not decide whether the photographs, admitted for demonstrative purposes, were relevant because we conclude they were not prejudicial in any event.

¶16 The "erroneous admission of evidence which was entirely cumulative constitute[s] harmless error." *State v. Williams*, 133 Ariz. 220, 226 (1982); *see also State v. Gertz*, 186 Ariz. 38, 42 (App. 1995) (error is harmless if beyond reasonable doubt error did not affect or contribute to verdict). Here, the photographs were cumulative to other properly admitted evidence. *See Williams*, 133 Ariz. at 226. Three witnesses testified that R.C. had been transported by a Native Air Helicopter and subsequently treated at Phoenix Children's Hospital. Specifically, K.C. testified that after she had been notified that R.C. had been hurt, she went to Cobre Valley Regional Medical Center, where she saw R.C. in the Native Air Helicopter and was told R.C. was being taken to Phoenix Children's Hospital. Additionally, the responding officer testified that he had taken a photograph of R.C. before he was "transported by helicopter to Phoenix Children's Hospital." Lastly, a Native Air flight paramedic testified that he had provided medical services to R.C. on the Native Air Helicopter while R.C. was being transported from Cobre Valley Regional Medical Center to Phoenix Children's Hospital. We are thus satisfied beyond a reasonable doubt that any error in admitting the photographs was harmless because it did not contribute to or affect the verdict. *See Gertz*, 186 Ariz. at 42.

Booking Photograph

¶17 Anaya also argues the trial court erred in admitting his booking photograph. He maintains there was no issue of identity and its admission was prejudicial because the jury was shown a booking photograph instead of a "typical, everyday photograph."

¶18 The state informed Anaya that it wanted to show the jury his booking photograph for identification. Anaya objected, arguing the booking photograph was not relevant because he was "not challenging identification" and numerous witnesses would be able to positively identify him. The trial court overruled the objection and allowed the state

to show the booking photograph during its opening statement, but specifically noted that it would wait to rule on the booking photograph's admissibility until the state offered it during trial. On the sixth day of trial, the court admitted the booking photograph over Anaya's objection.

¶19 Booking photographs may be relevant and admissible if identification is at issue. *Cf. State v. Thibeault*, 131 Ariz. 192, 194 (App. 1981) (booking photo may be used to make in-court identification of defendant absent from trial). A booking photograph, however, is not required to identify a defendant when other adequate evidence and testimony is admitted. *See State v. Rocha-Rocha*, 188 Ariz. 292, 295 (App. 1996); *State v. Hall*, 136 Ariz. 219, 221-22 (App. 1983). Here, although Anaya's identity was a fact of consequence, his booking photograph was not necessary to establish identification and was "needlessly cumulative" because it was admitted on the sixth day of trial, after three witnesses had positively identified him. *See* Ariz. R. Evid. 403.

¶20 Nonetheless, the admission of Anaya's booking photograph, even if improper, constitutes harmless error, *see Williams*, 133 Ariz. at 226, because Anaya, who was present at trial, conceded that he was not contesting identity, and the photograph was cumulative to other properly admitted evidence. *See State v. Romero*, 240 Ariz. 503, ¶ 17 (App. 2016); *Rocha-Rocha*, 188 Ariz. at 295. We are thus satisfied beyond a reasonable doubt, even assuming there was error, it did not contribute to or affect the verdict.[2] *See Gertz*, 186 Ariz. at 42.

Injury Photographs

¶21 Anaya argues the trial court erred in admitting ten photographs of R.C.'s injuries. He contends they were "unduly prejudicial and cumulative" because "the State's use was merely to play on the

[2]Despite Anaya's brief assertion that the booking photograph was "prejudicial" because it was "not a typical, everyday photograph," we find any such claim waived because he neither raised this argument below, nor did he develop it on appeal. *See* Ariz. R. Crim. P. 31.10(7) (appellant's opening brief must include argument for each issue presented for review with citations of legal authorities and appropriate references to the portion of the record on which the appellant relies); *Kiper*, 181 Ariz. at 66 ("[F]ailure to raise an issue at trial waives the right to raise the issue on appeal."); *see also State v. Bolton*, 182 Ariz. 290, 298 (1995) (failure to develop argument on appeal constitutes waiver of that claim).

emotions of the jury," and the photographs "establish[] the same point" of "injuries found on R.C."

¶22 A pediatric nurse practitioner at Phoenix Children's Hospital took photographs of R.C.'s injuries while conducting a physical exam. The photographs included a bite mark on R.C.'s chest, a bite mark on R.C.'s buttocks, dried blood on the inside of R.C.'s ear, "abrasions under the second, third, and fourth digits" on R.C.'s right foot, bruising and discoloration on R.C.'s hair line and scalp, as well as bruising behind R.C.'s ears.

¶23 The state informed Anaya that it wanted to show ten of these photographs during its opening statement. On the second day of trial, Anaya objected, arguing the ten photographs were "unduly prejudicial and cumulative." The trial court found the photographs were "not overly prejudicial" or "cumulative" for the purpose of the state's opening statement, but reserved ruling on the admissibility of each photograph until offered by the state.[3] Eight of the ten photographs were later admitted at trial.[4]

¶24 "The admission of photographs requires a three-part inquiry: (1) relevance; (2) tendency to incite passion or inflame the jury; and (3) probative value versus potential to cause unfair prejudice." *State v. Murray*, 184 Ariz. 9, 28 (1995). Here, the eight admitted photographs were relevant to support the state's theory that R.C. suffered from "multiple blunt impact injuries" that he could not have sustained from a single, four-foot fall and which had caused "brain death." *See State v. Burns*, 237 Ariz. 1, ¶ 62 (2015) ("A photograph of the deceased in any murder case is relevant to assist a jury in understanding an issue because the fact and cause

[3] The trial court noted that it would consider each photograph individually "if [Anaya] raise[d] it again." Shortly thereafter, five photographs were admitted without objection. The court later clarified Anaya's previous objection was a continuing objection. Because we prefer to address cases on their merits, *cf. Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342 (App. 1984), we assume the court's continuing-objection clarification applied to the first five admitted photographs, and we address them accordingly.

[4] Despite Anaya's assertion that there were ten photographs, two of the photographs were not admitted at trial, and we will not address them on appeal. *See State v. Pandeli*, 215 Ariz. 514, ¶ 54 (2007) (we do not address photographs not admitted).

of death are always relevant in a murder prosecution."). And although the photographs depicted several injuries, their probative value to help the jury understand how R.C. may have died was not outweighed by a danger of unfair prejudice. *See* Ariz. R. Evid. 403; *see also Butler*, 230 Ariz. 465, ¶ 33. Further, the photographic evidence was not cumulative as each photograph depicted a different injury on R.C.'s body and together established the state's theory that R.C. had suffered from "multiple blunt impact injuries," which caused death. *See State v. Kennedy*, 122 Ariz. 22, 26 (App. 1979) ("[C]umulative evidence merely augments or tends to establish a point already proved by other evidence."). We therefore conclude the trial court did not abuse its discretion in admitting the photographs into evidence. *See Buccheri-Bianca*, 233 Ariz. 324, ¶ 7.

Admission of Hearsay Testimony

¶25 Next, Anaya argues the trial court erred in admitting the video of M.A.'s forensic interview because her statements during the interview were not inconsistent with her testimony at trial, and Anaya was unable to "cross-examine M.A. during the forensic interview." He maintains the video of the interview amounted to inadmissible hearsay. We review the admission of evidence under the hearsay rule and its exceptions for an abuse of discretion, *see State v. Forde*, 233 Ariz. 543, ¶ 77 (2014), but review de novo challenges to admissibility under the Confrontation Clause, *see State v. King*, 213 Ariz. 632, ¶ 15 (App. 2006).

¶26 At trial, out of the presence of the jury, the trial court asked M.A., Anaya's four-year-old daughter, a series of questions to determine whether she knew the difference between telling the truth and a lie. The court then allowed her to see a portion of the video of her forensic interview. In response to the court's questions, M.A. stated that she did not remember going to the forensic examination location, talking to the forensic interviewer, or what she had told the interviewer. Shortly afterward, the jury was brought back into the courtroom, and M.A. testified that she remembered watching the forensic interview video in court, acknowledged that she was in the video, remembered talking to the forensic interviewer—calling her a "girl" and not a "lady"—but, still, could not remember what she had told the forensic interviewer.

¶27 The state then argued that under Rule 801(d)(1)(A), Ariz. R. Evid., the forensic interview video was admissible for impeachment purposes because M.A. was "feigning memory" as she admitted "that it was her in the movie," and "her talking," but subsequently denied making the statements in the recording. The trial court permitted the state to show

the video of the forensic interview to the jury under Rule 803(5), Ariz. R. Evid., and later admitted it under Rule 801(d)(1)(A).[5]

¶28 A statement is hearsay if the declarant did not make it "while testifying at the current trial or hearing" and it is offered "in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). A statement, however, is not hearsay if "[t]he declarant testifies and is subject to cross-examination about a prior statement," and the prior statement "is inconsistent with the declarant's testimony." Ariz. R. Evid. 801(d)(1)(A). "Arizona law draws a distinction between a true and a feigned loss of recall. Where the asserted loss is genuine, the prior statement is deemed not inconsistent under this rule, but if the loss is mere fakery, the statement falls within the rule." *State v. Anaya*, 165 Ariz. 535, 538 (App. 1990); *see also State v. Hausner*, 230 Ariz. 60, ¶ 58 (2012) ("A claimed inability to recall, when disbelieved by the trial judge, may be viewed as inconsistent with previous statements." (quoting *State v. King*, 180 Ariz. 268, 275 (1994))).

¶29 On appeal, Anaya argues the trial court erred in admitting M.A.'s forensic interview video because the in-court testimony M.A. provided was not inconsistent with the forensic interview. And, therefore, because "there was no inconsistency," Rule 801(d)(1)(A) does not apply and the forensic interview video's admission was improper. Relying on *Crawford v. Washington*, 541 U.S. 36 (2004), Anaya also contends the forensic interview should not have been admitted because he was "not afforded the opportunity to cross-examine M.A. during the forensic interview."

¶30 In *Crawford*, the state sought to introduce a statement by the defendant's wife who did not testify at trial under the state's marital privilege law. *Id.* at 38, 40. The defendant then argued that the statement's admission would violate his Sixth Amendment right to confront witnesses. *Id.* at 40. The trial court admitted the statement concluding that it had "particularized guarantees of trustworthiness." *Id.* The United States Supreme Court reversed the ruling and reasoned the admission of the wife's statement violated the Confrontation Clause because "[a]dmitting

[5]Although Anaya briefly contends the trial court erred in playing the forensic interview video at trial, he failed to develop this argument on appeal, and we consider it waived. *See State v. Moody*, 208 Ariz. 424, n.9 (2004) ("opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised" and failure to argue claim constitutes abandonment and waiver (quoting *State v. Carver*, 160 Ariz. 167, 175 (1989))).

statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Id.* at 61, 69. The Court further explained that to admit testimonial evidence, under the circumstances, the Sixth Amendment requires a witness be unavailable at trial and counsel have been afforded the opportunity to cross-examine the witness. *Id.* at 68.

¶31 *Crawford* is distinguishable. In this case, M.A. was available at trial and testified. And although her trial testimony was difficult to follow, Anaya concedes that he was able to cross-examine her about the forensic interview video before it was played for the jury and subsequently admitted. Thus, we find no *Crawford* violation.

¶32 Further, during her forensic interview, M.A. told the forensic interviewer that on occasion Anaya had "punched," "kicked," and "hit" R.C. In the video, M.A. also showed the forensic interviewer how and where Anaya had hit R.C. on her own body. After the video was shown in court, but not to the jury, M.A. acknowledged that she was in the video, but testified that she neither remembered telling the forensic interviewer what had happened to R.C. nor did she remember R.C. She later testified that she remembered the forensic interviewer, but did not recall telling her that Anaya had "kick[ed]," "hit," and "punch[ed]" R.C. Instead, she explained that R.C. had "f[allen] of[f] the wall." The record establishes that M.A. testified at trial, was cross-examined, and her trial testimony was inconsistent with what she had told the forensic interviewer. *See* Ariz. R. Evid. 801(d)(1)(A); *see also Hausner*, 230 Ariz. 60, ¶ 58 (quoting *King*, 180 Ariz. at 275). The trial court did not abuse its discretion in admitting the forensic interview video under Rule 801(d)(1)(A). *See Forde*, 233 Ariz. 543, ¶ 77.

Flight Instruction

¶33 Anaya argues the trial court erred by giving a flight instruction to the jury. We review a court's decision to give a jury instruction for an abuse of discretion. *See State v. Almaguer*, 232 Ariz. 190, ¶ 5 (App. 2013).

¶34 At trial, two detectives testified that during their investigation they had discovered Anaya moved to Gilbert, Arizona, to live with his uncle just days after the incident. Upon learning this, the detectives met Anaya at his uncle's home where they confiscated his cell phone. One detective explained that during his examination of the cell phone, he had discovered text messages that revealed Anaya was "upset" with L.S. for disclosing his location to the detectives. Specifically, Anaya had texted L.S.,

"why in the hell would you tell those people where in the hell I am, mom" and explained, "even the police would have said not to say stuff like that, [b]ecause it's basically saying, well, there he is. Go to him."

¶35 When the trial court and counsel were settling the final jury instructions, the court stated that it "would give the [flight] instruction, with slight modification," removing the "immediate flight" language. Anaya objected, arguing that "no evidence" was presented to show that he was "running away or hiding" or that "[he] fled to avoid prosecution." Anaya explained that he was "stay[ing] at his uncle's home" in Gilbert, Arizona, with K.C. to "help her with her grieving." The court explained that in giving the instruction, it was "relying upon the text message that was disclosed between [Anaya] and his mother, where he questioned why she was letting the police know where he was." The flight instruction given to the jury read:

> In determining whether the State has proved the defendant guilty beyond a reasonable doubt, you may consider any evidence of the defendant's running away or hiding, together with all the other evidence in the case. Running away or hiding after a crime has been committed does not by itself prove guilt.

¶36 "A flight instruction should only be given if the State presents evidence of flight after a crime from which jurors can infer a defendant's consciousness of guilt." *State v. Solis*, 236 Ariz. 285, ¶ 7 (App. 2014). Our supreme court has established a two-part test: (1) the flight or attempted flight was open such that it led to an immediate pursuit, or (2) "the accused utilized the element of concealment or attempted concealment." *State v. Smith*, 113 Ariz. 298, 300 (1976); *see also State v. Rodgers*, 103 Ariz. 393, 394 (1968). Stated differently, in determining whether to give the instruction, the trial court must "be able to reasonably infer from the evidence that the defendant left the scene in a manner which obviously invites suspicion or announces guilt." *State v. Speers*, 209 Ariz. 125, 132 (App. 2004) (quoting *State v. Weible*, 142 Ariz. 113, 116 (1984)); *see also Smith*, 113 Ariz. at 300 (leaving scene not sufficient to support flight instruction). Additionally, an alternate explanation for the defendant's actions "d[oes] not preclude the trial court from giving a flight instruction." *State v. Parker*, 231 Ariz. 391, ¶ 50 (2013) (alternative explanation creates fact question for jury).

¶37 On appeal, Anaya argues the trial court erred by giving the flight instruction because although he "le[ft] the scene in Gila County" he

was not "attempt[ing] to conceal[] or flee the scene." He explains that he left Gila County to be closer to R.C., who was being treated at Phoenix Children's Hospital, to "comfort [K.C.]," and "grieve over what had happened to R.C." We disagree.

¶38 The jury could reasonably infer from Anaya's text-message exchange with L.S. that he wanted to conceal his whereabouts from the detectives, *see Smith*, 113 Ariz. at 300, by suggesting that L.S. was wrong to reveal his location: "why in the hell would you tell those people where in the hell I am." When L.S. responded "I'm so sorry. I didn't know I was doing anything wrong," Anaya appeared to be "upset," and explained that the detectives knowing his whereabouts made it easier to "[g]o to him." And regardless of Anaya's alternative explanation for leaving Gila County, the trial court was not prohibited from giving the flight instruction. *See Parker*, 231 Ariz. 391, ¶ 50. Notably, the court also instructed the jury that it was permitted to "determine what the facts are in the case," and "consider the instructions that do apply, together with the facts, as you have determined them." *See State v. Prince*, 226 Ariz. 516, ¶ 80 (2011) (we presume jury followed its instructions). Accordingly, the court did not abuse its discretion by giving the flight instruction. *See Almaguer*, 232 Ariz. 190, ¶ 5.

Willits Instruction

¶39 Anaya contends the trial court erred by refusing his request for a jury instruction pursuant to *State v. Willits*, 96 Ariz. 184, 191 (1964). "We review the court's ruling for an abuse of discretion." *State v. Williamson*, 236 Ariz. 550, ¶ 32 (App. 2015).

¶40 In support of his request for a *Willits* instruction below, Anaya noted there was a "lack of swabbing [for] DNA on the [bite-mark] injuries" and argued he was entitled to a *Willits* instruction because the "lost evidence" could have potentially excluded him as the source for "causing th[e] bite marks" on R.C. which "alone constitute child abuse." The state responded that it had no intention "to argue or infer or imply that the defendant caused th[e] bite marks." The trial court denied the request, explaining, "To receive a [*Willits*] instruction, the defendant must show; Number One, the State failed to preserve material reasonably accessible in evidence. And Number Two, having a tendency to exonerate him. And Number Three, that the failure resulted in prejudice." The court determined that it did not need to address the second and third factors because "the State or its agents . . . [n]ever had custody of the child." It explained that "[R.C.] went directly from the paramedics, to the ambulance,

to the flight medics, to the hospital," and the detectives did not have the "opportunity" to "preserve that evidence, if there was any."

¶41 On appeal, as he did below, Anaya maintains he was entitled to the instruction because "there was a lack of swabbing or DNA evidence from R.C.['s] injuries," which "could have been potentially useful in proving that the Appellant did not cause the bite marks on R.C."

¶42 "[I]f the state fails to preserve evidence that is potentially exonerating, the accused might be entitled to an instruction informing the jury that it may draw an adverse inference from the state's action." *Williamson*, 236 Ariz. 550, ¶ 33 (alteration in *Williamson*) (quoting *State v. Glissendorf*, 235 Ariz. 147, ¶ 1 (2014)). Further, to be entitled to a *Willits* instruction, the defendant must show: "(1) the state failed to preserve material and reasonably accessible evidence that could have had a tendency to exonerate the accused, and (2) there was resulting prejudice." *State v. Smith*, 158 Ariz. 222, 227 (1988). The defendant, however, is not entitled to a *Willits* instruction simply because "a more exhaustive investigation could have been made." *Murray*, 184 Ariz. at 33. And "the state does not have a duty to seek out or preserve potentially exculpatory evidence for the defendant when they have developed sufficient evidence against him." *State v. Davis*, 205 Ariz. 174, ¶ 37 (App. 2002); *see also State v. Walters*, 155 Ariz. 548, 551 (App. 1987) (state must preserve evidence that is "obvious, material and reasonably within its grasp").

¶43 Anaya was not entitled to a *Willits* instruction simply because "a more exhaustive investigation could have been made," *see Murray*, 184 Ariz. at 33, nor did the state have a duty to attempt to locate DNA evidence associated with the bite marks when it had other evidence to support the child abuse and first-degree murder charges. *See Davis*, 205 Ariz. 174, ¶ 37. In any event, as the trial court correctly pointed out, "[R.C.] went directly from the paramedics, to the ambulance, to the flight medics, to the hospital," to be treated for a "severe brain injury." It was not "obvious" that child-size bite marks may have been "material," nor did the state have R.C. "within its grasp" to preserve the DNA evidence. *See Walters*, 155 Ariz. at 551. The court did not abuse its discretion in denying Anaya's request for a *Willits* instruction. *See Williamson*, 236 Ariz. 550, ¶ 32.

Prosecutorial Misconduct

¶44 Anaya argues the prosecutor committed misconduct when he "insinuated" his counsel had "coached several witnesses," called his counsel a "liar," and attempted to elicit precluded testimony, which,

cumulatively, "influenced the jury and its verdict," resulting in a denial of due process. Anaya acknowledges that he did not object to the alleged instances of misconduct below. Accordingly, we review his claim of prosecutorial misconduct for fundamental, prejudicial error. *See State v. Sallard*, 247 Ariz. 464, ¶ 16 (App. 2019). Under this standard, the defendant must show error and, if it exists, that the error is fundamental. *See State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). "A defendant establishes fundamental error by showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, or (3) the error was so egregious that he could not possibly have received a fair trial." *Sallard*, 247 Ariz. 464, ¶ 16 (emphasis omitted) (quoting *Escalante*, 245 Ariz. 135, ¶ 21). Additionally, the defendant must make a showing of prejudice if alleging error under factors one and two. *Id*.

¶45 Once error has been established, "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. West*, 238 Ariz. 482, ¶ 51 (App. 2015) (quoting *State v. Hughes*, 193 Ariz. 72, ¶ 26 (1998)). "Reversal on the basis of prosecutorial misconduct requires that the conduct be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *Hughes*, 193 Ariz. 72, ¶ 26 (quoting *State v. Atwood*, 171 Ariz. 576, 611 (1992)). "Prosecutorial misconduct constitutes reversible error only if (1) misconduct exists and (2) 'a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial.'" *State v. Morris*, 215 Ariz. 324, ¶ 46 (2007) (quoting *State v. Anderson*, 210 Ariz. 327, ¶ 45 (2005)). "We view a prosecutor's conduct within the context of the entire trial, and will not lightly overturn a conviction solely on the basis of a prosecutor's misconduct." *State v. Murray*, 247 Ariz. 447, ¶ 18 (App. 2019). And, "To determine whether prosecutorial misconduct permeates the entire atmosphere of the trial, the court necessarily has to recognize the cumulative effect of the misconduct." *Hughes*, 193 Ariz. 72, ¶ 26.

Coaching

¶46 First, Anaya argues that during trial and closing argument, the prosecutor "implied" Anaya's counsel had an "inappropriate meeting" with L.S. that caused her to "change[] her testimony." Specifically, during direct examination the prosecutor asked L.S., "during the break, you met behind closed doors with [Anaya's counsel]; is that correct?" L.S. answered affirmatively, and the prosecutor did not ask any additional questions regarding the meeting. Later, during cross-examination, Anaya's counsel

clarified through L.S.'s testimony that their conversation was "very short" and she did not "tell L.S. what to say." During closing argument, the prosecutor stated, "let's compare the credibility of the State's witnesses versus the credibility of the defense witnesses. Now, the State called [L.S.]. I had to call her, because she was in the middle of all of this, but clearly, she was a witness for the defense," referring to L.S.'s testimony, credibility, and cooperation with Anaya's counsel despite being the state's witness.

¶47 Although "[i]t is improper for a prosecutor to impugn the integrity of defense counsel," *see State v. Sanders*, 245 Ariz. 113, ¶ 99 (2018), taken in context, the comments related to L.S.'s credibility and not the integrity of Anaya's counsel. *See State v. Acuna Valenzuela*, 245 Ariz. 197, ¶ 96 (2018) (concluding prosecutor did not act with misconduct despite comments "accus[ing] the defense of 'manufacturing' testimony" because prosecutor's statements "relate[d] to witness credibility"). Thus, we find no error. *Escalante*, 245 Ariz. 135, ¶ 21.

¶48 Next, Anaya argues the prosecutor, again, during trial and closing argument, "impl[ied] . . . defense counsel influenced and encouraged Dr. Keen to change his testimony after a break." Dr. Phillip Keen, a forensic pathologist, first testified that when he had been interviewed by the prosecutor, he did not recall the prosecutor asking questions about "shaken baby syndrome." During a break, outside of the presence of the jury, the prosecutor directed the trial court and opposing counsel to Dr. Keen's pretrial interview transcript, which showed he had asked Dr. Keen about shaken baby syndrome. After the break, in the presence of the jury, Anaya's counsel showed Dr. Keen the transcript in which he was asked about the matter, and during re-cross-examination, Dr. Keen admitted that his previous testimony about shaken baby syndrome was "[n]ot a hundred percent true." During closing argument, the prosecutor, in part, referred to Dr. Keen's testimony, apparently challenging his credibility. Consequently, despite Anaya's assertions, the prosecutor's comments related to the witness's credibility and not the integrity of Anaya's counsel. *See Acuna Valenzuela*, 245 Ariz. 197, ¶ 96. Again, we find no error. *See Escalante*, 245 Ariz. 135, ¶ 21.

Outside of the Jury's Presence

¶49 Anaya next contends the prosecutor engaged in misconduct by suggesting Anaya's counsel had "coached M.A. and M.A.'s mother" and, at one point, called Anaya's counsel a "liar." Both instances, however, occurred outside of the presence of the jury and could not have prejudiced Anaya. *See State v. Bible*, 175 Ariz. 549, 595 (1993) (statements made outside

of jury's presence "could not have prejudiced Defendant"). Although, as recognized by the trial court, the prosecutor's conduct in calling defense counsel a liar was clearly inappropriate, no error, much less fundamental error, occurred here. *See Escalante*, 245 Ariz. 135, ¶ 21.

Marijuana Use and Depression

¶50 Finally, Anaya contends the prosecutor attempted to "elicit that [Anaya] suffered from depression," which was "contrary to the Court's [previous] ruling."[6] Specifically, on the third day of trial, before L.S. testified, Anaya's counsel argued that any reference to marijuana to show Anaya suffered from depression was "not relevant to the proof of whether . . . Anaya abused [R.C.]," nor was L.S. "qualified to give opinions about . . . [Anaya's] depression" or "whether he's using marijuana to self-medicate." The trial court agreed and precluded "any reference to the defendant's marijuana use" and "any reference to the defendant being depressed or having an issue of depression."

¶51 Later, during re-direct examination, the prosecutor asked L.S., "[Anaya] really isn't . . . a happy kid, is he?" Anaya's counsel objected, and the prosecutor argued L.S. testified that Anaya and R.C. had "a happy, loving relationship, which gives the impression that [Anaya is] a happy kid," explaining that Anaya's counsel opened the door to discuss that he suffers from depression. The trial court disagreed with the prosecutor and reaffirmed its prior ruling. Despite the court's ruling, however, the prosecutor continued to ask L.S. about Anaya's temperament and further asked L.S., "[Anaya] also has other problems, in regard to him being a happy person, doesn't he?" L.S. responded that she did not understand, and the prosecutor clarified his previous question and asked, "Are you aware of any other problems that [Anaya] has?" L.S. answered "no," and the prosecutor requested a sidebar. Out of the presence of the jury, the court

[6] Although Anaya generally states our review of his misconduct claim is for fundamental, prejudicial error because he did not object below, it appears he did object when the prosecutor attempted to elicit this testimony. However, we would reach the same conclusion under either a harmless error or fundamental error standard of review. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 18-20 (2005) (explaining that when issue is preserved, appellate court reviews for harmless error—requiring state to prove beyond reasonable doubt that error had no effect on verdict or sentence—and when issue is not preserved, appellate court reviews for fundamental error—requiring defendant to prove error prejudiced him).

warned the prosecutor "[i]f you continue in that area, I'm going to be forced to have a mistrial." Thereafter, the prosecutor did not mention Anaya's prior marijuana use or depression.

¶52 Although we acknowledge the prosecutor's line of questioning tested—if not crossed—the boundaries of the trial court's previous rulings, we defer to the court's decision to warn the prosecutor of an impending mistrial if he continued instead of declaring a mistrial at that time. *See also Taylor v. DiRico*, 124 Ariz. 513, 518 (1980) (court has great discretion in controlling conduct of trial); *cf. Taylor v. Cate*, 117 Ariz. 367, 369 (1977) (we "defer to the trial court's ruling on misconduct of counsel"). We, thus, find no error. *See Escalante*, 245 Ariz. 135, ¶ 21.

¶53 Even assuming, however, the prosecutor's questions amounted to misconduct, we view the prosecutor's conduct within the context of the entire trial, *see Murray*, 247 Ariz. 447, ¶ 18, and cannot conclude the isolated questioning "permeate[d] the entire atmosphere of the trial." *See Hughes*, 193 Ariz. 72, ¶ 26 (quoting *Atwood*, 171 Ariz. at 611). Specifically, Anaya's prior marijuana use and depression diagnosis were not discussed during opening statements in the presence of the jury, the prosecutor's three questions to elicit the specific testimony occurred on the third day of an eight-day trial, the jury heard eighteen witnesses after this testimony, and the prosecutor did not refer to Anaya's prior marijuana use and depression diagnosis in his closing argument. Therefore, because there is not a reasonable likelihood the misconduct affected the jury's verdict, *see Morris*, 215 Ariz. 324, ¶ 46 (quoting *Anderson*, 210 Ariz. 327, ¶ 45), any potential error was not prejudicial, *see Sallard*, 247 Ariz. 464, ¶ 16. Additionally, because we do not find multiple errors, we reject Anaya's assertion that the cumulative effect of the misconduct so infected the proceedings that he was denied a fair trial. *See Hughes*, 193 Ariz. 72, ¶ 26.

Rule 20 Motion

¶54 Anaya contends the trial court erred in denying his motion made pursuant to Rule 20, Ariz. R. Crim. P., arguing no substantial evidence was presented to support his convictions. We review de novo the court's denial of Anaya's Rule 20 motion. *See State v. Goudeau*, 239 Ariz. 421, ¶ 168 (2016). In doing so, we view the evidence in the light most favorable to upholding the court's ruling and determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. West*, 226 Ariz. 559, ¶ 16 (2011) (quoting *State v. Mathers*, 165 Ariz. 64, 66 (1990)). "[T]he controlling question is solely whether the record contains 'substantial evidence to warrant a conviction.'"

Id. ¶ 14 (quoting Ariz. R. Crim. P. 20(a)). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Rivera*, 226 Ariz. 325, ¶ 3 (App. 2011) (quoting *State v. Spears*, 184 Ariz. 277, 290 (1996)). Substantial evidence may be direct or circumstantial. *State v. Pena*, 209 Ariz. 503, ¶ 7 (App. 2005).

¶55 To support a conviction for child abuse under A.R.S. § 13-3623(A)(1), the state must prove: (1) the defendant "cause[d] a child . . . to suffer physical injury,"[7] (2) the physical injury occurred "[u]nder circumstances likely to produce death or serious physical injury," and (3) the defendant acted intentionally or knowingly. The intent requirement for child abuse "applies only to the defendant's actions, not to the 'under circumstances likely to produce death or serious physical injury' prong." *State v. Millis*, 242 Ariz. 33, n.7 (App. 2017) (quoting *State v. Payne*, 233 Ariz. 484, ¶¶ 69-71 (2013)). A defendant's "mental state will rarely be provable by direct evidence and the jury will usually have to infer it from his behaviors and other circumstances surrounding the event." *State v. Noriega*, 187 Ariz. 282, 286 (App. 1996); *see also State v. deBoucher*, 135 Ariz. 220, 224 (App. 1982) ("[E]vidence of intent to cause physical injury may be circumstantial in nature."). Additionally, a person commits first-degree murder, pursuant to A.R.S. § 13-1105(A)(2), if that person commits or attempts to commit child abuse under § 13-3623(A)(1), and "in the course of and in furtherance of the offense . . . causes death of [the child]."

¶56 On appeal, Anaya maintains there was insufficient evidence to establish that he "intentionally or knowingly caused R.C. to suffer a physical injury" under conditions likely to produce death or serious physical injury. And he argues, because the state failed to meet its burden to "show [Anaya's] state of mind to prove child abuse," it also failed to "prove[] the first-degree murder charge." We disagree. Although circumstantial, the state presented sufficient evidence to prove Anaya either intentionally or knowingly caused or permitted R.C. to suffer from a physical injury. *See deBoucher*, 135 Ariz. at 224.

¶57 K.C. testified that on the morning of the incident, R.C. was "completely healthy and normal," did not have any bruises on his body,

[7] A person may also commit child abuse if he has the care and custody of a child and causes or permits the health of the child to be injured, or if a person allows a child to be placed in a situation where the child's health is endangered. § 13-3623.

nor did she notice any blood or bleeding from his lip or ears. And she further explained when she saw him again during the lunch hour, R.C. appeared to be "perfect," and aside from scraping the top of his foot, R.C. did not have any marks or bruising on his body when she returned to work around 1:00 p.m. L.S. testified that on the morning of the incident, R.C. had "absolutely nothing wrong" with him, did not have any visible injuries on his body, and appeared to be "fine." When she saw R.C. later that afternoon, L.S. described R.C. as "lifeless," "limp," and recalled seeing R.C.'s eyes "roll[] up into the back of his head."

¶58 K.C. also testified Anaya generally had been caring for R.C. when she was at work and had done so on the day of the incident including between 1:00 p.m. and 3:00 p.m., when the incident occurred. L.S. similarly testified that on the day of the incident, Anaya had been the sole person responsible for R.C. that afternoon. Additionally, a nurse practitioner who spoke with R.C.'s family at the hospital had been told Anaya "was the person entrusted with the care of [R.C.]" when he was injured. Lastly, text messages between Anaya and his cousin revealed that he was caring for R.C. around 1:30 p.m. and that he was frustrated with R.C.

¶59 Additionally, the pediatric neurosurgeon who had cared for R.C. at Phoenix Children's Hospital testified that R.C. had a "very poor neurological exam," explained that he had "suffered a non-survivable injury," and concluded R.C. was brain dead. She also explained that after further medical testing, she had observed brain swelling, as well as brain and retinal hemorrhaging, which would not have been consistent with a short fall. Further, a child-abuse pediatrician testified that R.C. had suffered from abusive head trauma with "visible signs of impact" and "shaking." The doctor also explained that the injuries R.C. had to his forehead, bruising behind the ears, and bleeding from the mouth could not have been caused by a single simultaneous fall. Moreover, the pediatric nurse practitioner who had cared for R.C. in the intensive care unit explained that R.C. had bruising on both sides of his head, the front of his body, and on his legs and feet, which were not consistent with a single fall or accidental injury. Finally, the medical examiner testified that R.C.'s cause of death was "multiple blunt impact injuries" that caused "brain death." She further explained that because R.C. "had multiple blunt impact sites on all sides of his head" he could not have sustained the injuries by a single, four-foot fall.

¶60 Thus, despite Anaya's assertion that the trial court erred in denying his Rule 20 motion, substantial evidence to support convictions pursuant to §§ 13-3623(A)(1) and 13-1105(A)(2) was presented, *see West*, 226

Ariz. 559, ¶ 14, such that reasonable persons could find Anaya guilty beyond a reasonable doubt, *see Rivera*, 226 Ariz. 325, ¶ 3.

Disposition

¶61 For the reasons stated above, we affirm Anaya's convictions and sentences.